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IN THE

Supreme Court of the United States

October Term, 1963

No. 394

In the Matter of the Application of DANIEL F. O'BRIEN and LEONARD CASSAT, and others named in the schedule annexed hereto,

Petitioners,

vs.

THEODORE H. LANG as Personnel Director of the Department of Personnel of The City of New York and as Chairman of the Civil Service Commission of The City of New York, GEORGE GREGORY, JR., and ANTHONY M. MAURIELLO, as Commissioners of the Civil Service Commission of The City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

The petitioners seek to have this Court review by writ of certiorari, an order of the Court of Appeals of the State of New York, entered May 29, 1963 (Pet. Appendix B, p. 16) which unanimously affirmed without opinion a final order of the Appellate Division, First Department, entered February 21, 1963 which had (1) unanimously reversed on the law; an order of the Supreme Court, New York County (GOLD, *J.*); entered June 1, 1962, granting the application in the nature of *mandamus* of the 46 petitioners, under Article 78 of the Civil Practice Act and directing, *inter alia* that

the Commission accord to each petitioner the passing mark to which he is entitled in the written examination for promotion from Lieutenant to Captain, Police Department, City of New York, held on January 21, 1961 and (2) had dismissed the petition.

The affirmance in the Court of Appeals is reported in 13 N Y 2d 688 (1963). The opinion of the Appellate Division, First Department, is reported in 18 A D 2d 140.

The Question Presented

The primary issue presented is whether the respondent Commission has the power and, indeed, the duty to correct a clerical error of one of its employees upon discovery of such error, or whether it is to be forever foreclosed from rectifying such error. The error in question was set forth in a one day insertion of a readvertisement of examination for promotion to Captain, Police Department, which was published in the City Record on January 20, 1961, the day before the scheduled examination. This error resulted in the appearance of an amended notice which set forth an incorrect expression of the Commission's final decision as to the passing mark. The readvertisement contained a required passing grade of "70%" in error, instead of an authorized required passing grade of "75%" which had previously been fixed by resolution of the Commission. On the day of the examination, January 21, 1961, the printed material on the two cover pages of the examination booklet, which takes approximately one week to prepare, set forth in two places the fact that the required passing grade was "75%" on the written test. The error was discovered or brought to the Commission's attention some ten months later in November, 1961 and the Commission at a meeting held December 5, 1961 (1) admitted the error and (2) "reaffirmed the 75% passing mark in the written test for examination #8978 for Promotion to Captain, P. D."

The Appellate Division, First Department, in its opinion of reversal *per* STEVENS, *J.*, (18 A D 2d 140) found that (*id.*, p. 147) the "single publication on January 20, 1961 was ineffective" to change the 75% rating previously fixed by the Commission. The Court held further that in any event "[i]f any error existed it was within (the) Commission's power to correct the same and such power existed at the time the correction was made."

ARGUMENT

The petition was properly dismissed. No substantial federal question is presented herein since the Commission had both the power and the duty to correct its own clerical error.

The petition (pp. 3-5) asserts a deprivation of "* * * property, without due process of law" within the meaning of the expression as set forth in Constitution of the United States, Articles 5th and 14th, because the Commission at a "public" meeting held December 5, 1961, took action to reaffirm the "75%" passing mark in the examination in question. Each of the petitioners received grades below 73.1% and contrary to counsel's assertion (p. 2) none of them were ever graded as having "passed the examination." On December 28, 1961, each petitioner received a failure notice. The corrected clerical error on which the petitioners rely to achieve a passing grade was caused by an employee of the Commission who was charged with the duty of inserting the readvertisement in the City Record. The employee prepared a sample copy of such advertisement and inadvertently neglected to note the change of the 70% rating to 75% pursuant to the Commission resolution of December 5, 1960.

The Commission's authority to correct its own error has been carefully defined and limited by the courts of this state.

In *People ex rel. Finnegan* v. *McBride*, 226 N. Y. 252 (1919), the Court of Appeals in an opinion *per* POUND, *J.*, recognized (p. 259) that an error "may be corrected by setting it aside if it was the result of illegality, irregularity in vital matters or fraud", citing *People ex rel. Hotchkiss* v. *Board of Supervisors of Broome County*, 65 N. Y. 222 (1875). The Court observed further that action so taken must "be for cause, with good reasons and proper motives for the correction of improper action." Moreover, the Commission's authority to correct its own error prior to the establishment of an eligible list is wider in scope and limited only by a showing of bad faith or palpable illegality. *Matter of Greiner* v. *McNamara*, 298 N. Y. 395 (1949); *Matter of Stout* v. *Board of Examiners*, 274 N. Y. 367 (1937); *Matter of Blumenthal* v. *Morton*, 273 App. Div. 497 (1st Dept., 1948), aff'd 298 N. Y. 563 (1948); *Matter of Fischein* v. *Reavy*, 263 App. Div. 490 (3rd Dept., 1942) aff'd 289 N. Y. 712 (1942); *People ex rel. Caridi* v. *Creelman*, 150 App. Div. 746 (1st Dept., 1912). Under Commission Rule 4.5.4, the respondents had the authority to correct any mistake "on its own initiative" at "any time prior to the establishment or during the existance of an eligible list."

No illegality is established by the erroneous statement (Br., p. 5) that the announcement of the 75% passing mark "was not published 'daily, in full for at least one week.'" The 75% passing mark was in fact published for one full week (excluding Sunday) starting December 12, 1960, and noticed for seven calendar days thereafter thus fully complying with Commission Rule 4.1.3, which specifies that a notice be published "in full for at least one week." Nor can these petitioners derive any benefit from the fact that 11 candidates were permitted to compete in the examination on applications filed on January 20, 1961 pursuant to the erroneous amended notice. These candidates, like the petitioners and the remaining 844 candidates were all graded on the basis of a 75% passing mark. It follows therefore

that the error did not affect the competitive nature of the examination nor did it favor one group of candidates over another. No showing is made of any prejudice to the 46 candidates in question other than the fact that they failed to achieve the passing grade properly fixed prior to the examination by Commission resolution.

Finally, a close inspection of *Matter of Gilbert* v. *Kroll*, 17 Misc 2d 409 (Sup. Ct., N. Y. Co., 1955), aff'd 1 AD 2d 819 (1st Dept., 1956), aff'd 2 NY 2d 896 (1957) cited (Br., p. 6) as being "on all fours" with the instant case, fails to sustain that conclusion. In the *Gilbert* case the eight petitioners competed in a licefise examination for the position of principal, elementary day school. There, the "hurdle" type examination was divided into two parts. Part one was a "supervision" test and unsuccessful candidates were barred from competing in a subsequent written examination. The board, unlike the Commission in the case at bar, fixed no passing grade prior to the examination. Each of the eight petitioners were graded between 60 and 65% on the test in question. After the papers were graded, however, the board fixed a passing grade of 65% and failed each of the petitioners relying solely on a by-law which permitted it to fix the passing grade on *written tests* "after the answer papers had been rated but before the identity of the applicants [had] become known to the board or any member of its staff."

At Special Term, the petitioners pointed out that other by-laws of the board defined a supervision test as a practical test and provided further that "the passing grade on a practical test, unless otherwise determined by the board, shall be 60%." The Court there ruled that these by-laws were controlling rather than the one relied on by the board, and struck down the action of the board (17 Misc 2d at p. 410) in "fixing a passing grade after an examination has been had and the papers graded." The Commission, in the proceeding at bar, unlike the board in the *Gilbert* case, was not changing a previous decision or even attempting to

rectify a previous omission, but rather correcting a previous error. Therefore, the fact that the examination had been held when the error was corrected is just not pertinent to the facts presented.

Special Term pointed out further, in *Gilburt*, that one candidate in the same examination who had been graded at 60.25%, had successfully prosecuted an appeal to the New York State Commissioner of Education who ordered that he be rated as having passed the test. This decision, according to the Court, created a situation (*id.*, p. 412) where "different candidates upon one examination [were] treated unequally." The Court then concluded that "[s]urely that result cannot be allowed to stand if there be any legal means of affording petitioners some relief."

Moreover, in *Gilburt*, the petitioners eventually sustained their favorable ruling at Special Term by arguing in the Court of Appeals (*Matter of Gilburt*, Resp. Br., pp. 7-18) that "[t]here was *no error* in the original fixation of the 60% pass mark, *nor any other factual basis* for changing it to 65% after the rating of the answers" (*emphasis supplied*). In the case at bar there was obvious error and a factual basis for correcting it.

CONCLUSION

The petition for certiorari should be denied.

September 18, 1963

Respectfully submitted,

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